



IN THE

Supreme Court of the United States

October Term, 1978

No. 78-898

F.C.Y. CONSTRUCTION AND EQUIPMENT COMPANY,
INC., an Arizona corporation; WINEGLASS LIVESTOCK
COMPANY, INC., an Arizona corporation; CHRISTINE
NICHOLS and CORRINE COOPER,

Petitioners,

v.

HARRISON, INC., a Minnesota corporation; HUGH H.
HARRISON; and DOUGLAS A. RUSSELL,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals
and the Supreme Court of the State of Arizona

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents request that the petition for certiorari in this matter be denied.

OPINIONS BELOW

The unreported memorandum decision of the Arizona Court of Appeals appears at the Appendix to the Petition, page A-1. The formal judgments entered by the Yavapai County Superior Court are attached hereto as Appendices A and B.

JURISDICTION

The memorandum decision of the Arizona Court of Appeals was entered on June 6, 1978. A timely filed motion for rehearing was denied on July 10, 1978. A petition for review by the Arizona Supreme Court was thereafter denied on September 7, 1978. The petition for certiorari was filed on December 5, 1978. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

We cannot agree that the "questions presented" offered by petitioners were questions actually presented to or decided by the courts below. We therefore restate the question as follows:

Have the three concurring courts below fairly determined under Arizona law that petitioners' only recorded interest to certain real property is a mere contractual right to a percentage of profits in case of its sale, that petitioners have no interest affecting its title, and that the record contains no factual basis supporting the imposition of a constructive trust concerning it?

STATEMENT OF FACTS

This petition concerns whether summary judgments were correctly entered under Arizona law holding that petitioners had no real property interest affecting title to the Eleven Lakes Ranch, located in Yavapai County, Arizona. Petitioners filed their first complaint and lis pendens on October 19, 1973, seeking a declaration of the ownership rights, beneficial interests, and duties of the parties with respect to this property. Petitioners then filed a second suit challenging

respondent Harrison, Inc.'s. ("Harrison") deed to the property and seeking a declaration that Harrison held the property as a constructive trustee for them.

Respondents thereafter filed motions for summary judgment in the Yavapai County, Arizona, Superior Court on the narrow ground that petitioners had no legal interest affecting title to the Eleven Lakes Ranch and that their lis pendens neither constituted nor gave notice of a legal claim upon its title. These motions were granted separately in each case by the superior court on May 21, 1975. Final judgments in favor of respondents and quashing the lis pendens were thereafter filed in both suits. They are attached hereto as Appendices A and B. These judgments were thereafter affirmed in the unpublished memorandum decision of the Arizona Court of Appeals attached as Appendix A to the Petition.

The documents constituting the Eleven Lakes Ranch chain of title and the transactions involving one B. A. Yarbrow, from whom petitioners claim their interest, are somewhat involved. They are accurately summarized in the court of appeals decision and need not be repeated here. For this Court's convenience, however, we attach as Appendix C to this Response a chart summarizing the chain of title and the Yarbrow transactions based on the record before the Arizona courts. The chart was attached as an appendix to respondents' answering brief in the court of appeals.

The chart and the facts summarized in the court of appeals' decision confirm that Yarbrow lost whatever legal interest he might have had in the Eleven Lakes Ranch through a series of sheriff's deeds and a quit claim deed executed in 1962-64, long before the operative transaction relevant to this action. His only later interest, which was the basis for

petitioners' claim, was merely a contract right to a contingent percentage commission based on net profits in case of sale of ranch land. At the time of the assignment of this interest to petitioners, Yarbrow had no legal interest of record in the Eleven Lakes property.

The issues litigated in the Arizona courts related only to whether and on what basis petitioners had any interest affecting title to the Eleven Lakes Ranch or whether any facts existed requiring the imposition of a constructive trust on that real property under Arizona law. No federal questions were presented to or decided by the Arizona courts at any time. Instead, the superior court simply entered a partial summary judgment holding that petitioners had no interest affecting the title to the Eleven Lakes Ranch or in the conveyance of that property to respondent Harrison, that their lis pendens did not constitute record notice of any legal claim to a lien or interest in the title to that property, that it neither constituted nor gave notice of any cloud upon the title to that property, and that the lis pendens should therefore be quashed. These summary judgments were affirmed by the court of appeals on the basis that Yarbrow had no legal interest in the Eleven Lakes Ranch, had not purported to transfer any such interest to petitioners, and that there were no facts justifying imposition of the constructive trust on the property.

Petitioner's motion for rehearing in the court of appeals reiterated their earlier claims. Under Arizona practice, their petition for review was submitted to the Supreme Court of Arizona based on the prior record without additional argument. That petition was denied without opinion. The questions now presented in the petition alleging denials of constitutional rights to trial by jury and of due process in

violation of the Seventh and Fourteenth Amendments have thus never previously been presented to or decided by any of the courts below. All three Arizona courts presented with this matter have instead dealt with and rejected petitioners' claims as presented—solely as matters of Arizona law.

REASONS FOR DENYING THE WRIT

I. *The Arizona Courts Have Properly Determined Questions of State Law that Should Not Be Reviewed Here.*

The determinations by the Yavapai County Superior Court and the Arizona Court of Appeals that petitioners had no legal interest in the Eleven Lakes Ranch property and that their lis pendens should therefore be quashed were correct as matters of Arizona law. The court of appeals carefully reviewed and analyzed the chain of title to the Eleven Lakes Ranch property and the various agreements shown in the attached summary. The court of appeals held that "there was no way by which appellants could have obtained a legal interest in the title to Eleven Lakes Ranch through Yarbrow" (Petition, A-8). It also held, applying the Arizona law on constructive trusts, that no facts existed to impose such a trust or give petitioners any equitable claim to the Eleven Lakes Ranch (Petition, A-10). In reaching these conclusions, the court of appeals considered the Corrine Cooper affidavit upon which petitioners principally rely here. It held, however, that the affidavit was insufficient as a matter of law to raise any material issues of disputed fact so as to preclude entry of partial summary judgment dismissing this portion of petitioners' claims.

Any claim that the court of appeals decision was in error as a matter of Arizona law or in conflict with any decision

of this Court is conspicuously absent from the petition. Instead, petitioners contend only that the Arizona appellate courts improperly affirmed the superior court's summary judgments because the record presented issues of fact requiring the cases to go to trial. The petition does not specify precisely what these issues are or explain how any such fact issues rise to the level of substantial federal questions. The fact of the matter is that the only affidavit presented in opposition to respondents' motion, that of Corrine Cooper, did not raise any factual issue regarding petitioners' lack of interest in the Eleven Lakes Ranch property. This issue was fully briefed, argued, and decided by the court of appeals.

The matters presented for review are only specific factual matters. Those matters are inappropriate for this Court to review. As this Court stated in *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 925 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." This is particularly true when all of the courts below have concurred. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672 (1949), *aff'd*, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097 (1950), and cases there cited; *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

II. *The Alleged Federal Questions Presented in the Petition Have Not Been Previously Raised Before the Arizona Courts. They Thus Cannot Be Raised for the First Time in the Petition.*

Petitioners for the first time now attempt to raise federal constitutional questions. They now claim that the entry of summary judgments denied their rights to jury trials and to

due process in violation of the Seventh and Fourteenth Amendments. Petitioners have, however, wholly failed to "set up or claim" these issues in the Arizona courts as required by 28 U.S.C. § 1257(3) to preserve them for review by this Court. As this Court stated in *F. G. Oxley Stave Co. v. Butler County, Mo.*, 166 U.S. 648, 655, 17 S. Ct. 709, 711, 41 L. Ed. 1149 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right." See generally Stern & Gressman, *Supreme Court Practice* §§ 3.25 and 3.26 (4th ed. 1969). There have been no such averments here. There is thus nothing properly presented to this Court for review.

Not surprisingly, the Petition presents no authorities supporting its proposition that the lower courts' determinations that no material questions of fact were raised precluding summary judgments somehow bootstrap an otherwise entirely Arizona law matter into one involving substantial federal questions. If petitioners were correct, all state court summary judgments, regardless of the issues actually involved, would be entitled to review by this Court. Moreover, on this record, such a claim is patently specious. At all times in the Arizona courts, this matter has been argued and decided wholly with reference to Arizona law concerning real property interests and constructive trusts. No federal question has ever been previously presented or decided. None should therefore be considered here.

III. *The Issues Here Involved Are Not of Sufficient Importance or General Interest to Warrant Review.*

Despite petitioners' puffing, this case concerns nothing more than a summary judgment relating to a particular parcel of real property. The judgment is of interest and importance only to the immediate parties. Summary judgment was in fact properly granted, but regardless of the merits, that issue is not of sufficient importance or general interest to warrant this Court's review. Although the issue may be important to the parties, it must be "beyond the academic or the episodic" for this Court to undertake its consideration. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955). On this record, there simply are no important constitutional, statutory, or procedural issues requiring determination. Nothing in this record suggests that the decisions below were so "shockingly wrong" as to present any substantial due process questions. See generally Stern & Gressman, *supra*, §§ 4.11 through 4.15.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,
LEWIS AND ROCA

By Roger W. Kaufman
Paul G. Ulrich
Susan M. Freeman
Attorneys for Respondents

December, 1978.

APPENDIX A
THE SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

F.C.Y. CONSTRUCTION	)	No. 29494
AND EQUIPMENT CO.,	)	FINAL JUDGMENT ON
et al.,	)	COMPLAINT WITH RE-
	)	SPECT TO DEFEN-
Plaintiffs,	)	DANTS HARRISON,
	)	INC., HUGH H. HARRI-
vs.	)	SON AND DOUGLAS A.
TRANSAMERICA TITLE	)	RUSSELL AND FINAL
INSURANCE COMPANY,	)	JUDGMENT QUASHING
et al.,	)	LIS PENDENS WITH RE-
	)	SPECT TO THE ELEVEN
Defendants.	)	LAKES RANCH

(Assigned to the Honorable James Hancock Division 2)

(FILED: July 15, 1975)

The Court having considered the pleadings, depositions, and affidavits filed in this action as they relate to the plaintiffs' complaint against defendant Harrison, Inc., Hugh H. Harrison and Douglas A. Russell and as they relate to the property known as the Eleven Lakes Ranch, and the Court having heard arguments of counsel with respect to those defendants' Motion for Summary Judgment in connection with plaintiffs' complaint, and the Court having previously entered a minute entry order granting Summary Judgment to the above-named defendants, the Court now finds that those defendants are entitled to Judgment against the plaintiffs on plaintiffs' complaint, that there is no material question of fact with respect to the plaintiffs' complaint and with respect to the specific findings requested by the moving defendants; and, pursuant to Rule 54(b) Arizona Rules of Civil Procedure, the Court further finds that there is no just reason for delay in entering judgment in favor of those defendants,

quashing lis pendens on the Eleven Lakes Ranch, and adjudicating all issues among those parties and the plaintiffs presented by the complaint and the moving defendants in Motions for Summary Judgment. This Court hereby directs that judgment be entered forthwith and;

IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants Harrison, Inc., and Hugh H. Harrison and Douglas A. Russell have judgment against the plaintiffs in this action that plaintiffs take nothing by reason of their complaint, and, with respect to remaining issues in this law suit, as follows:

1. The plaintiffs have no interest affecting title to the real property known as the Eleven Lakes Ranch;
2. The plaintiffs have no real property interest in the conveyance of the Eleven Lakes Ranch property to Harrison, Inc.;
3. The plaintiffs' lis pendens filed in this action does not constitute record notice of any legal claim to a lien or other interest in the title to the real property known as the Eleven Lakes Ranch;
4. Such lis pendens neither constitutes nor gives notice of any cloud upon the title to the property;
5. The lis pendens is quashed; and
6. Costs are awarded to defendants in the amount stated in the statements of costs filed by these defendants in this action.

DONE IN OPEN COURT this 15 day of July, 1975.

/s/ James Hancock
Judge James Hancock

Copy of the foregoing
mailed this 14th day
of July, 1975, to:

[Entered Civil Docket 49
Page 635]

[Entered Judgment Docket
16 Page 413]

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/s/ Gayle Gibson

The foregoing instrument is a full, true and correct copy of the original on file in this office.

ATTEST March 25, 1976

CLASSIE GANTT, Clerk of
Division One Court of Appeals,
State of Arizona

By /s/ Muriel S. Hume

[Seal]

[Book 1014, pages 235-237]

APPENDIX B
THE SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

F.C.Y. CONSTRUCTION
AND EQUIPMENT CO.,
et al.,

Plaintiffs,

vs.

SELWYN ARIZONA
ASSOCIATES, et
al.,

Defendants.

(Assigned to the Honorable James Hancock Division 2)

(FILED: July 15, 1975)

The Court having considered the pleadings, depositions, and affidavits filed in this action as they relate to the plaintiffs' complaint against defendant Harrison, Inc., Hugh H. Harrison and Douglas A. Russell and as they relate to the property known as the Eleven Lakes Ranch, and the Court having heard arguments of counsel with respect to those defendants' Motion for Summary Judgment in connection with plaintiffs' complaint, and the Court having previously entered a minute entry order granting Summary Judgment to the above-named defendants, the Court now finds that those defendants are entitled to Judgment against the plaintiffs on plaintiffs' complaint, that there is no material question of fact with respect to the plaintiffs' complaint and with respect to the specific findings requested by the moving defendants; and, pursuant to Rule 54(b) Arizona Rules of Civil Procedure, the Court further finds that there is no just reason for delay in entering judgment in favor of those defendants.

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4. Such lis pendens neither constitutes nor gives notice of any cloud upon the title to the property;
5. The lis pendens is quashed; and
6. Costs are awarded to defendants in the amount stated in the statements of costs filed by these defendants in this action.

DONE IN OPEN COURT this 15 day of July, 1975.

/s/ James Hancock

Judge James Hancock

Copy of the foregoing
mailed this 14th day
of July, 1975, to:

[Entered Civil Docket 51
Page 326]

[Entered Judgment Docket
16 Page 414]

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/s/ Gayle Gibson

The foregoing instrument is a full, true and correct copy of the original on file in this office.

ATTEST March 25, 1976

CLASSIE GANTT, Clerk of
Division One Court of Appeals,
State of Arizona

By /s/ Muriel S. Hume

[Seal]

[Book 1014, pages 238-240]

ELEVEN LAKES RANCH CHAIN OF TITLE AND SUMMARY OF YARBRO TRANSACTIONS

Yarbro Transactions

1962-64

B.A. Yarbro owned Eleven Lakes Ranch; James A. Wooten also had partial interest.

Deeds
1962, 1963, 1964

Eleven Lakes Ranch Chain of Title

All interest in Eleven Lakes property acquired through 3 sheriff's deeds and Yarbro quitclaim deed by Arizona Savings; all others divested of any interest,

1968

7/26/68 Letter management agreement—B.A. Yarbro and S.A.A.

8/17/68 Yarbro assigns 20% bonus rights under letter agreement to plaintiffs,

8/30/68 and 9/3/68 Maricopa County Superior Court approves sale by Arizona Savings to Transamerica Title Ins. Co.

9/5/68 Eleven Lakes title conveyed to Transamerica as trustee.

9/10/68 Eleven Lakes property placed in Trust No. RH-20,918.

9/20/68 Yarbro assigns all rights of letter agreement to plaintiffs.

Transamerica Title legal interest as trustee

Henry C. Soto beneficial interest.

9/27/68 Beneficial interest assigned Henry C. Soto Corporation.

9/28/68 Beneficial interest assigned F.O.M. Investment Corporation.

1969

7/22/69 Second letter management agreement—B.A. Yarbro and S.A.A.

8/1/69 Yarbro assigns 20% bonus rights under second agreement to plaintiffs.

1972

4/1/72 Harrison, Inc. loans Selwyn-Edwards & Assoc. \$225,000—loan provision allows Harrison to pursue all default remedies against its collateral. Yarbro approves loan agreement.

4/5/72 F.O.M. Investment Corp. and Selwyn-Edwards & Assoc. make collateral assignment of beneficial interest to Harrison, Inc. as security for loan to Selwyn-Edwards & Assoc.

1973

9/7/73 Yarbro records his two management agreements and assignments of bonus rights, certifying that the second agreement and assignment superseded the first. He did not record his superseded assignment of 9/20/68.

10/19/73 Lis pendens recorded in Yavapai Cause No. 29494.

10/19/73 F.O.M. Investment Corp. directs Transamerica Title to terminate Trust No. RH-20,918 and deed Eleven Lakes to Harrison, Inc. in satisfaction of delinquent loan payments.

10/22/73 Transamerica Title terminates trust and issues warranty deed to Harrison, Inc.